

# Defence of a basic voluntary act requirement in criminal law from philosophies of action

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# DEFENCE OF A BASIC VOLUNTARY ACT REQUIREMENT IN CRIMINAL LAW FROM PHILOSOPHIES OF ACTION

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When looking to identify the basic ingredients required for criminal responsibility,<sup>1</sup> reference is standardly made to a voluntary act requirement (VAR). We blame a defendant (D) for what she has *done* where such *doing* or is proscribed by law; we do not punish mere thoughts or character. Variations of the VAR trace back to Hume and other eighteenth century writers, translated into modern legal thinking by Austin,<sup>2</sup> and followed/refined by a greater number since.<sup>3</sup> Narrowing from a complete offence description, or even a complete actus reus description, the VAR seeks to identify the root of D's causal agency and responsibility, most commonly understood in terms of voluntary bodily movement (but also often including certain omissions).<sup>4</sup> Focus on voluntary bodily movement or omission makes sense. In the context of a potential criminal event, once it has been established that D voluntarily moved her body in a certain way, D's voluntary conduct can provide a potential nexus of agency to prohibited results caused by that conduct, accompanying circumstances, mens rea, and so on. Where voluntary conduct is lacking there can be no such nexus between D and any potential surrounding harms, and so no liability should be found.<sup>5</sup>

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<sup>1</sup> Most theorists share the desire to identify minimum ingredients, to help make sense of and limit the boundaries of criminal law. However, many also question whether such ingredients will ever be found. R.A. Duff, 'Vice, Virtue, and Criminal Liability: Do We Want an Aristotelian Criminal Law?' (2002) 6 *BuffCrimLRev* 147.

<sup>2</sup> J. Austin, *Lectures on Jurisprudence of the Philosophy of Positive Law* (5<sup>th</sup> Ed, 1885).

<sup>3</sup> See, in particular, J. Stephen, *A History of the Criminal Law of England* (Vol 2, Macmillan, 1883); C. Kenny & J. Turner, *Kenny's Outlines of Criminal Law* (17th ed, CUP, 1958); D. Davidson, 'Agency' in *Essays on Actions and Events* (Oxford, 2001) 43; M. Moore, *Act and Crime* (OUP, 1993); P. Robinson, *Structure and Function in Criminal Law* (OUP, 1997), G. Yaffe, 'The Voluntary Act Requirement' in A. Marmor (ed.) *The Routledge Companion to Philosophy of Law* (Routledge, 2012) 174.

<sup>4</sup> W Cook, 'Act, Intention and Motive in the Criminal Law' (1916) 26 *Yale LJ* 645, 648.

<sup>5</sup> This applies to both fault based as well as so-called strict or absolute liability offences.

The potential for the VAR to perform this role effectively within the substantive criminal law has an intuitive appeal often shared by supporters and critics alike, operating to ensure the basic links of agency required for moral and criminal responsibility.<sup>6</sup> However, despite courts' continuing to affirm the VAR as axiomatic to criminal responsibility,<sup>7</sup> it has become ever more difficult for courts and commentators to maintain a consistent and defensible interpretation of the requirement. This is because, drawing upon debates within the wider philosophies of action, criminal law theorists have increasingly challenged our core understandings of the VAR, and particularly the potential identification of voluntary bodily movement at its heart.<sup>8</sup> Following two lines of attack, critics have questioned whether the *descriptive identification* of bodily movement within the VAR is theoretically sustainable, as well as whether (if made sustainable) the VAR can play any useful *normative role* within the criminal law. Duff presents such criticisms as a catch22 for advocates of a VAR:

On the one hand, the notion of an 'act' could be given a reasonably determinate meaning: but it is then quite implausible to claim that the criminal law either is or should be founded on the 'act requirement'... On the other hand, we might extend the notion of an 'act' to cover [all cases within the law] but this would empty the 'act requirement' of any substantive content...<sup>9</sup>

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<sup>6</sup> Acknowledged variously by Duff in particular. Cf. For critique of this intuitive appeal, R. Shapira, 'Structural Flaws of the "Willed Bodily Movement" Theory of Action' (1997) 1 *BuffCrimLRev* 349, 383-402.

<sup>7</sup> See, for example, the recent judgment of the High Court of Australia in *Koani v The Queen* [2017] HCA 42, [21].

<sup>8</sup> See, in particular, H.L.A. Hart, 'Acts of Will and Responsibility' in *Punishment and Responsibility* (OUP, 1968) 90; M. Corrado, 'Is There an Act Requirement in the Criminal Law?' (1993) 142 *UPaLRev* 1529; G.P. Fletcher, 'On the Moral Irrelevance of Bodily Movement' (1994) 142 *UPaLRev* 1443; A.P. Simester, 'On the So-called Requirement for Voluntary Action' (1997) 1(2) *BuffCrimLRev* 403; Shapira (n6 above); D. Husak, 'The Alleged Act Requirement in Criminal Law' in Deigh & Dolinko (eds.) *The Oxford Handbook of Philosophy of Criminal Law* (OUP, 2011) 107; R.A. Duff, *Answering for Crime* (OUP, 2009) Ch. 5.

<sup>9</sup> R.A. Duff, *Criminal Attempts* (OUP, 1996) 243.

What follows provides a defence to both parts of this challenge by stripping back the VAR to its basic defensible core elements: addressing the descriptive challenge in Part 2 and the normative challenge in Part 3. It is contended here that both lines of attack can be answered, and that a coherent and normatively useful articulation of the VAR can be achieved. To this end, the article defends a version of the VAR defined in terms of voluntary bodily movements and omissions to move. This definition, including the role of omissions, requires considerable unpacking and defending. However, before we begin this defence, two points of clarification are required within Part 1: setting out the role of the philosophies of action within my account, and the practical relevance of the discussion.

## **PART 1. THE VAR AND THE PHILOSOPHIES OF ACTION**

There is a noble tradition of philosophical debate challenging, informing and shaping our understanding of legal concepts, and so the presence of such debate engaging with core terms such as ‘action’, ‘omission’, and ‘voluntariness’ should be neither surprising nor cause for concern. However, in the context of the VAR, it is contended that the relationship between theoretical and doctrinal analysis has become skewed in favour of philosophical debate, with such debate increasingly dictating *both* the critique *and* the defence of that requirement.<sup>10</sup> Two damaging trends have emerged from this.

The first trend relates to something akin to a doctrinal disowning of the VAR. As core terms within the VAR have become associated with debates within the philosophies of action, so we see an increased reluctance from courts and doctrinal commentators to offer precise legal definitions and/or to engage with the doctrinal role of the VAR. This is most obvious in

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<sup>10</sup> The only alternative, it seems, has been to simply avoid theoretical criticism by appealing to the intuitive or long-standing acceptance of the VAR. This is the approach of most criminal law textbooks, for example.

jurisdictions with criminal codes, where the VAR may be codified,<sup>11</sup> alongside related terms such as ‘action’ and ‘omission’. Despite the importance of clear definitions when applying the law, we have seen drafting committees increasingly willing to provide non-specific definitions, or to propose the removal of definitions altogether, explicitly referencing complexities within the philosophical context as their reason for doing so.<sup>12</sup> In uncoded jurisdictions such as England and Wales, similar vagaries are apparent. Where elements of the VAR are discussed at all, they are invariably confined to brief (and undefined) headlines about the importance of ‘consciousness’<sup>13</sup> and ‘willing’.<sup>14</sup> And rather than being presented as a an essential offence element, we see discussion jettisoned to the ‘defence of automatism’, a concept that may at best be interpreted as an unnecessary synonym of involuntariness,<sup>15</sup> and at worst as an uncertain sub-set of involuntariness without justification or use.<sup>16</sup> The effects have been pervasive, and will be explored further in Part 3. Essentially, current uncertainty as to the content of the VAR has provided scant defence against the creation of apparently inconsistent legislation,<sup>17</sup> and the divorced concept of automatism has been left to develop as a narrowing defence.<sup>18</sup>

The second trend has occurred within the philosophical debate, where theories of action in law (ie, definitions of the VAR) have become combined or conflated with comprehensive theories of action in general. An example of this, which we return to in Part 2, has stemmed

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<sup>11</sup> See, for example, the US MPC §2.01.

<sup>12</sup> New Zealand and Australia provide useful examples. In New Zealand, the Crimes Consultative Committee recommended in 1991 that the definitions of ‘action’ and ‘omission’ should be removed from the Crimes Bill (*Report on 1989 Crimes Bill* (1991) 9-12). In Australia, the Model Criminal Code drafting committee omitted a definition of ‘conduct’, citing the ‘complex’ context within philosophy (Australian Model Criminal Code (Commentary) s202).

<sup>13</sup> *Murray v The Queen* [2002] HCA 26; *Burgess* [1991] 2 QB 92, 98; *T* [1990] Crim LR 256, 257.

<sup>14</sup> *Ryan v The Queen* [1967] HCA 2, [18].

<sup>15</sup> It was interpreted this way by Lord Denning in *Bratty v AG for NI* [1963] AC 386.

<sup>16</sup> If all offences require voluntariness, then why look to isolate a sub-set of this and refer to it as a defence? See discussion in Part 3.

<sup>17</sup> For discussion, see, G.R. Sullivan, ‘Conduct and Proof of Conduct – Two Fundamental Conditions for the Imposition of Criminal Liability’ in K. Kaikobad & M. Bohlander (eds.) *International Law and Power: Perspectives on Legal Order and Justice* (Martinus Nijhoff, 2009) 235.

<sup>18</sup> Discussed further in Part 3.

from the work of Moore.<sup>19</sup> Moore's approach fuses the discussion of action within the VAR with a comprehensive metaphysical theory of action in general, defining both in terms of volitions causing bodily movements, and with each integral to the other. Contrary to this position, other theorists such as Duff contend that action should be understood from a communicative or nominalist perspective, as relative to our descriptions rather than discoverable in metaphysics - rejecting Moore's theory of action in general, and therefore also in law.<sup>20</sup> The problem here is that the VAR has become a paradigm within wider debates between competing philosophies of action, with little incentive for any side to analyse it as potentially special (severable) within the legal context. Legal commentators are then left to endorse whichever theory they find most compelling, and/or best suits their view of action in law.<sup>21</sup> But in so doing, the legal commentator necessarily commits themselves to a certain comprehensive view of action in general – standing immediately in opposition to those who endorse competing theories, and significantly widening the target for critics of the VAR to include all integral elements of the wider theory. With this unappealing choice on offer, it is little wonder that we identified doctrinal disowning within the first trend.

The central purpose of this article is to counter both trends. The VAR must be compatible with philosophies of action and must answer to philosophical critique, but such answers need not themselves originate from a view of action outside of its criminal law context. The aim of this article, therefore, is to defend a conception of action in law (ie, voluntary bodily movement or omission) without anchoring that approach within any single comprehensive account of action in general. As will become clear, stripping back the VAR from wider theories of action provides us with a solid basis upon which to defend its descriptive identification (Part

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<sup>19</sup> Moore (n3 above). See also the highly influential work of Davidson (n3 above).

<sup>20</sup> Duff (n9 above) 94-97.

<sup>21</sup> L. Alexander and K. Ferzan, for example, tentatively endorse Davidson's realist theory in *Crime and Culpability* (CUP, 2009) 229.

2), and to maintain its central normative role in establishing and tracing responsibility (Part 3). It should be acknowledged from the outset that competing definitions or variations of the VAR, originating from different theories of action, will generally promise considerably more in terms of normative pay-off than the conception defended in this article.<sup>22</sup> The aim here is not to promise more, but to identify a defensible account of the VAR that can be confidently employed by courts and doctrinal commentators. This article arises from the context of a wide-ranging attack on the VAR that is currently undermining its use.<sup>23</sup>

## **PART 2. THE DESCRIPTIVE CHALLENGE: WHAT IS THE VAR?**

The descriptive challenge consists of two distinct but related limbs. First, if we are to define the VAR in terms of voluntary bodily movements and omissions, then we need to be able to explain and justify why this aspect of D's agency has been singled out. We do this in Part 2A. Why focus on bodily movement and not the contraction of muscles for example, or in the opposite direction, more complex descriptions such as stabbing, shooting, driving and so on? Second, having justified a definition of the VAR centred on voluntary bodily movements and omissions, it is necessary to explain how such a definition works descriptively within the full range of current criminal offences. We do this in Part 2B. How does the absence of bodily movement describe omissions liability? And how can a focus on bodily actions/omissions describe offences of possession, status and vicarious liability? The preferred definition of the VAR must not be under-inclusive. The aim of Part 2 is to sketch and defend a stripped-back model of the VAR; to provide the descriptive grounding required for the normative goals discussed in Part 3.

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<sup>22</sup> Discussed in Part 3.

<sup>23</sup> The need for such an account is acknowledged in J. Horder, *Ashworth's Principles of Criminal Law* (OUP, 2016) 111-114; Sullivan (n17 above).

When analysing both limbs of the descriptive challenge, and indeed the normative challenge in Part 3, an analytical separation will be made between the physical element (or actus reus) of the VAR, defined in terms of bodily movement/omission, and the mental element (or mens rea) of the VAR, defined in terms of voluntariness. This separation is not made in order to make any wider claims about action in philosophy,<sup>24</sup> quite the opposite.<sup>25</sup> As will be evident throughout, it is contended that separating the external and internal elements of the VAR, as we do for other criminal offences elements, can be analytically useful.

### **Part 2a. Defining the VAR in terms of voluntary bodily movement and omission**

This article defends a stripped-back definition of the VAR centred on voluntary bodily movement and voluntary omissions as to bodily movement alone. It is contended that criminal liability can only be justified where it is demonstrated, as a necessary component of liability, that D voluntarily moved or omitted to move her body in a certain proscribed manner.

This definition draws considerably from standard metaphysical realist accounts of action.<sup>26</sup> Within such wider accounts of action, bodily movement becomes the focus for analysis because it is identified as a form of ‘basic action’ at the root of all ‘complex act descriptions’ (ie, act descriptions including circumstances, results and intentions). For example, where Lucy is observed driving her car, her basic acts merely relate to the movement of her arms and legs, with all other aspects/descriptions of her complex action stemming from those basic movements. In this sense, as Davidson usefully coined, “we never do more than

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<sup>24</sup> See, Corrado (n8 above); Cf. M. Moore, *Placing Blame: A General Theory of the Criminal Law* (OUP, 1997) 315-318.

<sup>25</sup> See G. Williams, *Criminal Law: The General Part* (Stevens, 1961) 14-15, where Williams critically identifies the fusing of conduct and mental elements within the VAR, observing its emergence from action theory.

<sup>26</sup> Described by J. Hornsby as the ‘standard story’ in the philosophy of action, ‘Agency and Action’ in J. Hyman & H. Stewart (eds.) *Agency and Actions* (2004) 1, 3. See also, A. Baier, ‘The Search for Basic Actions’ (1971) 8(2) *AmPhilQ* 161.



move our bodies: the rest is up to nature.”<sup>27</sup> Bodily movements (and omissions) promise a similar role within a criminal offence, providing the basic ingredient of responsible agency upon which more complex descriptions (elements of a criminal offence) may be constructed. For example, where Lucy causes death by dangerous driving,<sup>28</sup> we may begin our analysis again with the basic movements of her arms and legs. From here, once it is established that Lucy performed those actions voluntarily, we may then ask more expansive questions about her state of mind at the time, the circumstances, and any results flowing from her actions.

Given the natural convergence between metaphysical realist views of basic action and the focus on bodily movement within accounts of the VAR (including the current account), it is little wonder that the two are often combined and/or conflated in analysis. Indeed, the discussion of basic action in philosophy is particularly useful as an explanation for the structural role of the VAR within a criminal offence. However, as highlighted in Part 1, we should take care not to conflate comprehensive accounts of action in general with voluntary conduct in crime, and doing so on even a descriptive level can be highly damaging – both in terms of added complexity, as well as exposure to criticism from competing theoretical accounts. We see this, for example, in the important debate about criteria for the identification of basic action in philosophy, a debate that has focused on bodily movement but has equal relevance to omissions.<sup>29</sup> It is important to trace this debate to understand its relevance to the VAR.

In order to identify voluntary bodily movement as basic action within a comprehensive theory of action in philosophy, metaphysical realists must first provide the criteria for singling out this point within an event. What is special or unique about bodily movement? One possible

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<sup>27</sup> Davidson (n3 above) 59.

<sup>28</sup> An offence contrary to the Road Traffic Act 1988, s1.

<sup>29</sup> As we explore below, identifying a criterion of basicness for omissions to move may be even more challenging.

answer holds that bodily movement is *causally basic*: it represents the starting point in a causal chain which opens to include complex descriptions. However, even leaving to one side debates about mental causation, it is difficult to maintain that bodily movement is physically causally basic, as it occurs only after various pre-movement processes (eg, various motor-function activity, the flexing of muscles, and so on).<sup>30</sup> This places metaphysical realists on the horns of a dilemma. They could abandon bodily movement in favour of the more causally basic pre-movement processes,<sup>31</sup> but this would create potential for infinite regression and/or dissolution of action into neurophysiological processes that don't seem to be actions, or active, at all. Or the metaphysical realist could maintain a focus on bodily movement by appealing to an additional criterion of basicness. One such criterion claims bodily movement as *intentionally basic*, that even if certain physical processes are causally basic to movement, the most basic thing we can intend is to move our body. But here again problems arise, because if we are focusing on consciously directed conduct, which we must to claim that pre-movement processes are not intended in the same way as bodily movements, then metaphysical realists must explain why people often act in complex ways that involve little or no conscious conception of the precise bodily movements involved (eg, tying laces, speaking, and so on).<sup>32</sup>

Where definitions of the VAR also identify bodily movement as the basis for D's agency, it is easy to see why commentators have ascribed the same dilemma here as well. If our analysis of D's agency and responsibility within the VAR must begin with bodily movement, then we also need criteria to establish and justify its identification. For communicative or nominalist action theorists, the lack of criteria identifying bodily movement

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<sup>30</sup> See, generally, Baier (n26 above); J. Annas, 'How basic are basic actions?' (1977) 78 *ProArSoc* 195, G.P. Fletcher, 'The Act Requirement' in *The Grammar of Criminal Law* (OUP, 2007) 266; Duff (n9 above) Ch. 9-11; Duff (n8 above) Ch. 5.

<sup>31</sup> Alternatively referred to as 'volitions'.

<sup>32</sup> Moore and other realists have responded, highlighting the potential (even in lace tying etc.) for a person to consciously focus on her movements in a way that differs from pre-movement processes, or for this to have been the case during the learning of such movement. Moore (n3 above) 161. Problems with this explanation are discussed in Duff (n9 above) 258-259.

should lead us to the rejection of any search for basic action in general as well as within the VAR, and the realisation that action rather exists as a product of wider observation, social perspective and description.<sup>33</sup> And just like that, the proponent of the VAR is seemingly inevitably drawn into the philosophical debate, searching alongside metaphysical realists to defend the identification of bodily movement as basic (under some criterion) to action *in general*. The draw of this debate is not inevitable however. To justify the identification of voluntary bodily movements and omissions within the VAR a criterion of basicness is required, but this need not be interpreted as a search for basic action within a comprehensive theory of action in philosophy.<sup>34</sup> By bracketing the wider debate and focusing on basic action within the criminal law context alone, it may be that the same criteria (causal and intentional basicness) can be employed in a new way.

Crucial to the identification of bodily movements and omissions at the core of the VAR, in this article, is the contention that such conduct is *causally basic within the criminal law*. For metaphysical realists, as we have seen, the claim that bodily movement is causally basic to action in general leads to a regression problem: limited only by our biological and psychological understandings of the human mind and body, it is difficult to justify the special status of bodily movement (as causally basic movement) as opposed to a range of pre-movement processes. However, when defining action in the criminal law the problem of regression does not apply, or at least not in the same way. This is because, whether or not pre-movement processes may be identified as action in general, they are not relevant points of engagement for criminal liability and therefore do not represent action in law. The criminal law engages with agents as they interact with the external world: interaction through the movement

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<sup>33</sup> See Duff (n9 above) 94-97; Annas (n30 above).

<sup>34</sup> Alexander and Ferzan highlight this point (n21 above) 229. See also Yaffe (n3 above) 174.

of their bodies, or interaction through the omission to move when required by law.<sup>35</sup> The reasons why the criminal law waits for such interaction before being engaged are both practical<sup>36</sup> and normative.<sup>37</sup> Indeed, some of these reasons are central to the normative value of the VAR and will be discussed in Part 3. However, for present purposes it suffices to identify this descriptively distinctive aspect of criminal law engagement, recognising that it provides us with a criterion of causal basicness: the most basic criminally relevant thing that D can do is to move or omit to move her body.

Having established bodily movements and omissions as causally basic within the criminal law (grounding their identification within the VAR), it is not necessary, as it has been for metaphysical realists, to demonstrate that bodily conduct is *also* intentionally basic.<sup>38</sup> Rather, the descriptive burden within the VAR is simply to understand voluntariness in the context of bodily movements and omissions; to demonstrate that for all criminal events it is possible to identify and question this element of D's offence. In this regard, we could interpret voluntariness in terms of consciously intended conduct, the result of conscious practical reasoning that accords with D's beliefs and desires.<sup>39</sup> However, despite the potential normative benefits of this approach in narrowing the criminal law, it does not meet the descriptive burden and must therefore be rejected: just because D's conduct arises from reflex or habitual

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<sup>35</sup> As Ashworth has said, 'To proceed to conviction without proof of a voluntary act would be to fail, in the most fundamental way, to show respect for individuals as rational, choosing beings. More generally, if people were liable to conviction despite doing nothing, or if something had been done to them, this would fail to respect their autonomy and would certainly not give them fair warning of the criminal sanction, unless reasonable duties had been made plain to them.' A. Ashworth, *Principles of Criminal Law* (2nd ed, OUP, 1995) 95. The descriptive truth of this position is not new. See, for example, Stephen (n3 above) 97; Turner (n3 above) 26–27.

<sup>36</sup> D's physical conduct places the potential offence in time and space (both crucial for the law), as well as providing a manifestation of D's criminal choice. This later point is often related to evidential difficulties where such manifestation not required, including a problematic reliance on confession evidence. Williams (n25 above) 2. Sullivan has related the point to Article 6 ECHR, G.R. Sullivan, 'Parents and their Truanting Children: An English Lesson in Liability without Responsibility' (2010) 12 *OtLRev* 285.

<sup>37</sup> Yaffe (n3 above) 175. See also Fletcher, who claims that criminal liability in the absence of an action or omission would amount to illegitimate state interference with the private realm, referring to the action requirement as a 'buffer against overweening state power'. Fletcher (n30 above) 295. This argument may also be related to Duff's conception of *public* wrongs. See Duff (n8 above).

<sup>38</sup> The difficulties of establishing intentional basicness are discussed in Duff (n9 above) 258–259.

<sup>39</sup> See Duff (n8 above) Ch5.

movement, for example, will not necessarily undermine liability,<sup>40</sup> and similarly, when performing almost any complex action, it would be exceptional to do so by individually and consciously willing each bodily movement. Rather, a better approach is to focus on conduct that Davidson refers to as intentional “under some description”,<sup>41</sup> or more appropriate to this discussion, *voluntary* under some description.<sup>42</sup> As this approach explains, although basic conduct will rarely be consciously intended in its own right, we should still accept it as voluntary if it forms a component part of wider intentional action. For example, although Lucy may not focus on her individual hand movements when driving, such hand movements represent a voluntary component of her intentional driving, and are therefore voluntary under that description. Similarly, when performing a reflex or habitual movement, D’s conduct remains voluntary as a product of her agency, even where such movement was not consciously deliberated.

In demonstrating causal criteria for isolating voluntary bodily movements and omissions in the criminal context, and explaining the role of voluntariness, philosophical objections to the VAR have been avoided without reliance on a comprehensive theory of action in general. Indeed, by isolating our investigation of action to the criminal law context alone, it is further contended that our definition of action within the VAR need not be presented as in tension with those wider theories. This is perhaps most obvious in relation to metaphysical realist theories of action, with the focus on bodily conduct within the VAR mirroring much of their approach to action in general. But the VAR can also be interpreted consistently with

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<sup>40</sup> This point is discussed in Simester (n8 above) 407 & 421-422.

<sup>41</sup> Davidson (n3 above) 50-51. A similar approach is used within communicative explanations of intended conduct to account for multiple descriptions of the same act. See, R.A. Duff, *Intention, Agency and Criminal Liability* (Blackwell, 1990) 89-91; Duff (n9 above) 310, Ch1.4 & 8.4.

<sup>42</sup> ‘Voluntary’ is preferred to recognise the difference between acting with an ‘intention’ to cause (ie, the paradigm of intention) and the component movements of the body. Voluntariness is also more apt to reflect degrees of bodily control, as well as to account for problem examples (eg, D who allows her body to be moved by another). For criticism of ‘intention’ in this context, see A.P. Simester, ‘Agency’ (1996) 15(2) *Law&Phil* 159, 161 & 174.

nominalist or communicative theories of action as well. This is because, although such theories identify actions and events as expressed through multiple and potentially conflicting descriptions, they acknowledge the role of the law in defining abstract definitions that will capture multiple act descriptions. For example, Duff makes the following observation in relation to intentions and criminal attempts,

An agent acts ‘with intent to commit an offence’ if the content of her intention is such that, given the context in which she forms and acts on it, she would necessarily commit an offence in carrying it out.<sup>43</sup>

Within statements of this kind, there is acknowledgement of the vital separation between event descriptions in general and event definitions in law. Although D’s actions and intentions may be described in any number of ways (in line with nominalist theories), it remains acceptable for the law to identify a single abstracted definition and to ask whether those descriptions can be caught within it.<sup>44</sup> Central to this article is the simple claim that this same legitimate abstraction can and should be extended to our legal understanding of the VAR: as long as it is wide enough to capture the various descriptions of action relevant to crime, then its use and definition may be accepted.

## **Part 2b. Defining the VAR to avoid under-inclusivity**

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<sup>43</sup> Duff (n9 above) 23.

<sup>44</sup> A further example from Duff can be seen in his discussion of duress: explaining that D may describe her actions in one way (eg, under compulsion and/or done to prevent harm), but that we may legally look within these descriptions to apply the legal definition of intention “on some level”. Duff (n41 above) 52-53.

Perhaps the most common criticism of the VAR is that it is descriptively under-inclusive, that several categories of offences do not include a VAR. Standard examples include omission offences, possession offences, vicarious or status offences, and thought offences. For those defending the VAR, each example must be either explained to include voluntary conduct, or presented as anomalous (and therefore criticised as an illegitimate or exceptional use of criminal law). We take each example in turn.

Central to almost every rejection of the VAR defined in terms of voluntary bodily movement is the apparent failure of such conceptions to account for omissions liability, a form of liability that is (increasingly) common across large and varied parts of the law. This criticism forces proponents of the VAR either to defend an unintuitive position in which omissions are presented as exceptions or even products of fiction,<sup>45</sup> or to expand their definition of the VAR to include both bodily movements and omissions to move. This article opts for the latter approach, identifying the VAR in voluntary omissions to move as well as voluntary movements.<sup>46</sup>

A focus on bodily movement within the VAR at the complete or partial exclusion of omissions is a mistake that has arisen in the literature via two routes, each of which is rejected here. First, where the VAR is grounded within a particular comprehensive theory of action in general, the treatment of omissions within that wider theory will necessarily influence definitions within the VAR. We see this with Moore, for example, who maintains complex distinctions in order to incorporate certain omissions as action,<sup>47</sup> and is ultimately forced to explain large portions of the criminal law as illegitimate or exceptional.<sup>48</sup> This challenge to a

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<sup>45</sup> Yaffe, for example, presents omissions as a form of legal fiction. Yaffe (n3 above) 176.

<sup>46</sup> This option is often avoided because of criticism that the VAR then becomes *over*-inclusive. This criticism is explored and rejected in Part 3.

<sup>47</sup> For example, between resisting (defined as action), refraining (defined as non-action), and omitting. Moore (n3 above) 87-88 & 273.

<sup>48</sup> Moore (n3 above) 34. Criticised in Corrado (n 8 above).

certain form of metaphysical realist account should not be taken as fatal to any realist account,<sup>49</sup> but provides clear illustration of how anchoring the VAR within a particular account of action can create additional burdens. A second route by which omissions have been excluded from definitions of the VAR arises by way of normative choice. What is meant by this (discussed variously below) is that commentators often overreach in their interpretations of the VAR, either in an effort to achieve certain normative ends (eg, trying to limit certain forms of omissions liability, such as those not manifesting criminality), or to criticise the VAR for not achieving such ends.<sup>50</sup> It is contended that omissions, like movements, should be analysed through the VAR rather than excluded from it. Further narrowing of omissions liability can still be achieved through the tailoring of duties to act.

The next descriptive challenge for the VAR relates to possession offences, such as possession of illicit items and/or with wrongful intent. It was possible to avoid problems in relation to omissions through the explicit identification of non-movement within the VAR, but possession offences are more problematic. This is because the term possession does not appear to have a natural correlation to bodily conduct: liability seems to arise from D's *being* in possession, not from a specific movement or non-movement. Despite this lack of natural correlation, however, it is clear that possession offences can be interpreted in line with the VAR.<sup>51</sup> If we ask what D has *done* wrong in such cases, it is still possible to point to her initial acts in gaining possession, or (often more appropriately<sup>52</sup>) to her omissions in not divesting herself of that possession.<sup>53</sup>

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<sup>49</sup> See B. Vermazen, 'Negative Acts' in B. Vermazen & B. Hintikka (eds.) *Essays on Davidson* (OUP, 1985) 93–104. Davidson largely accepts this approach, see D. Davidson, 'Reply to Bruce Vermazen', 217–21.

<sup>50</sup> For criticism of the VAR's failure to meet this inappropriate goal, see Fletcher (n8 above); S. Morse, 'Culpability and Control' (1993) 142 *UPaLLRev* 1587, 1649–1650.

<sup>51</sup> See generally G. Yaffe, 'In Defence of Criminal Possession' (2016) *CrimL&Phil* 441.

<sup>52</sup> The omissions within a possession will usually spread over a longer spell of time, and so are more likely to correspond with other offence elements.

<sup>53</sup> This approach has been accepted for several decades: Williams (n25 above) 8. See Simester et al, *Simester and Sullivan's Criminal Law* (6<sup>th</sup> ed, Bloomsbury, 2016) 87–88.



When identifying voluntary conduct within any offence, including possession offences, it is important to remember that we are locating an essential ingredient for criminal liability, but not necessarily a sufficient one.<sup>54</sup> It is not suggested that D's voluntary movement or non-movement alone provides an account or determinative marker of appropriate criminalisation. Thus, for example, where D is unaware that she is in possession of an illicit item (eg, because it has been slipped into her bag), we can agree with Husak that criminalising this possession would be normatively undesirable, whilst maintaining that D satisfies the conduct element of the possession offence (ie, she is voluntarily omitting to move her body in a way that would divest her of the item). Husak criticises such accounts as "strained", maintaining that the role of the VAR is to deny liability in cases of this kind.<sup>55</sup> But this is to require too much of the VAR. The unaware possessor does not deserve liability, not because her omission is involuntary, but because of her lack of knowledge as to what she possesses.

The next two offence categories, vicarious and status offences, should be approached in a similar way to possession offences. As with possession offences, liability based on the actions of another (vicarious liability) and liability based on membership or position (status offences) do not appear to correlate naturally with an analysis focused on bodily conduct. However, again, in both cases, it should always be possible to ask what D has *done* to create the vicarious relationship or to assume the status, or what D has *failed to do* to divest herself of either. Where the answer to these questions is that D has done something apparently innocent and perhaps largely unconnected with the mischief of the offence charged, then this is a basis upon which to challenge the *normative* acceptability of the offence at issue.<sup>56</sup> We see this, for example, in strict liability offences for parents whose children fail to attend school regularly,

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<sup>54</sup> Discussed in Part 3.

<sup>55</sup> D. Husak, 'Does Criminal Liability Require an Act?' in R.A. Duff (ed.) *Philosophy and the Criminal Law* (CUP, 1998) 60, 71.

<sup>56</sup> Discussed in Part 3.

where the offence can be made out in the absence of present failures in parenting (ie, D does not need to have done or failed to do anything that has *culpably* contributed to her child's absence).<sup>57</sup> However, again, it is important to distinguish this normative challenge from a descriptive one. Although we can and should challenge the apparent absence of a culpable act (discussed further in Part 3C), it is still possible to describe actions that have given rise to the vicarious relationship, and so the VAR defended in this article remains descriptively accurate.

The final group, pure thought offences, provides the only categorical descriptive counter-example to the VAR. Pure thought offences would criminalise D in the absence of any related bodily conduct, for example, for forming an intention to commit terrorist acts. However, such offences are exceptional, and should be criticised as illegitimate. In England and Wales, the only example remains the archaic treason offence of compassing or imagining the death of the king,<sup>58</sup> an offence that has not been applied for many decades (and never, to this writer's knowledge, in its pure thought based construction). Offences exist which primarily focus on D's mens rea to establish the targeted mischief, and inchoate offences, including specific inchoate offences targeting terrorist planning, are obvious examples of these. However, such offences still require voluntary conduct from D; they are not pure thought offences. We can highlight any disconnect in such offences between D's conduct and mens rea as part of a normative critique, discussed in Part 3, but the descriptive challenge is still met. Therefore, although pure thought offences would provide a descriptive counter-example to the VAR, concessions to the definition defended here are not necessary.<sup>59</sup>

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<sup>57</sup> See Sullivan (n36 above); and, more generally, Sullivan (n17 above). Sullivan's analysis is useful, but he is also guilty of overreaching in his interpretation of the VAR, interpreting it as a link between D and the wrongs of an offence (ie, going beyond voluntary conduct alone).

<sup>58</sup> The Treason Act 1351, II.

<sup>59</sup> Cf Husak (n55 above) 86-90.

### PART 3. THE NORMATIVE CHALLENGE: WHAT IS THE ROLE OF THE VAR?

Having provided a defence to the descriptive challenge in Part 2, and avoided problems of under-inclusivity, the danger is that the VAR so-defined will be stripped of its normative content. As Corrado cautions:

The act requirement now seems to come to this: No one can be punished unless she either moves or fails to move her body. That may seem to be an empty requirement (who could fail to satisfy it?).<sup>60</sup>

This new perception of *over*-inclusivity provides an alternative basis upon which to reject the VAR. For those adopting this position, a normative rejection of the VAR is either an end in itself, opens the possibility for the formation of a different VAR,<sup>61</sup> or becomes the foundation for a new (more normatively rich) requirement based on control for example,<sup>62</sup> or agency.<sup>63</sup> Under these alternatives to the VAR, rather than focusing on D's bodily movements and omissions, we are encouraged to examine D's authorship of the criminal mischief, her ability to have changed the course of events for which she is being blamed. Such alternatives encounter major problems of their own of course, both descriptive and normative, but their ambition is appealing.<sup>64</sup>

In response to this line of criticism, it is important to understand the terms of the debate. We can agree with critics of the VAR that a general theory of justified criminalisation would

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<sup>60</sup> Corrado (n8 above) 1541.

<sup>61</sup> This was true of Corrado, for example.

<sup>62</sup> Husak (n55 above); Husak (n8 above).

<sup>63</sup> S. Dimock, 'Intoxication and the Act/Control/Agency Requirement' (2012) 6(3) *CrimL&Phil* 341.

<sup>64</sup> Duff, for example, having earlier expressed some support for the control requirement, has latterly rejected it as insufficiently clear. See Duff (n8 above) 72 & Ch5.

be beneficial for the criminal law, helping us to understand the correct boundaries of the law, and restraining against the creep of over-criminalisation.<sup>65</sup> We can also agree (if we wish) with critics of the VAR that metaphysical realist theories of action such as that espoused by Moore do not capture the true meaning of action in general.<sup>66</sup> However, in both cases, such agreement need not lead us to a rejection of the VAR as defined and defended in this article, particularly as neither critique offers something substantively viable and descriptively accurate in return. There is a burden to demonstrate the normative value of the VAR, but overstretching this burden (either in support or in critique) is counterproductive. Thus, for example, the discussion of the VAR that follows will not claim that it can define the acceptable limits of criminalisation beyond a minimum requirement;<sup>67</sup> will not claim that D's conduct within the VAR must be independently wrongful;<sup>68</sup> will not claim that the VAR captures the difference between actions and omissions;<sup>69</sup> and will not claim that the VAR will always provide evidence of mens rea as to offence circumstances or results.<sup>70</sup> The risk with ambitions of this sort is that, when they cannot be met, the baby is discarded with the bathwater. Instead, we must focus on what the baby *can* do, and why it is worth protecting.

In setting out the normative value of the VAR, it is also necessary to resist, at least partially, the binary separation commentators have made between the VAR as a 'condition' of criminalisation (among others), or as the 'object' of criminalisation (representing the central criminal mischief).<sup>71</sup> It is contended here that such descriptions do not stand in opposition, and

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<sup>65</sup> Indeed, without an accepted theory of criminalisation, it is impossible to understand what over-criminalisation is.

<sup>66</sup> See, for example, Duff (n9 above) Part 3; G.P. Fletcher, *Rethinking Criminal Law* (OUP, 2000) 434-438.

<sup>67</sup> Defining the acceptable limits of the criminal law is a separate, and ongoing, search.

<sup>68</sup> Whilst a full offence must criminalise a wrong to be normatively justified, there is no reason why this must be independently true of the act element any more than any other element of the full offence.

<sup>69</sup> For criticism of the VAR in this regard, see Fletcher (n8 above).

<sup>70</sup> For criticism of the VAR in this regard, see Duff (n41 above) Ch6. Yaffe overreaches, therefore, when he contends that the VAR must "manifest a mental state". Yaffe (n3 above) 184-189.

<sup>71</sup> See, for example, R.A. Duff, 'Action and Criminal Responsibility' in T. O'Connor & C. Sandis (eds.) *A Companion to the Philosophy of Action* (Blackwell, 2010) 331, 332.

may both apply to the VAR. However, care must be taken. Although a strong representation will and should be made for the VAR as a necessary normative condition of liability, its description as the object of liability must be more restrained. It is not claimed here that the VAR alone can tell us the acceptable limits of criminalisation. However, in combination with all other offence elements, the VAR will still represent a constituent part of the object or mischief targeted by an offence, and one we must take time to understand. And beyond this, and perhaps more importantly, the VAR can also provide the key to unlock D's responsibility for a full offence description. D's voluntary conduct, her most basic interaction with the external world, provides the basis for an essential nexus of agency between D and other elements of her offence: causally linking her to proscribed results, and/or linking her with criminal circumstances and mens rea.<sup>72</sup> Far from a simple condition, therefore, the VAR becomes the essential gateway through which we may legitimately blame D for her conduct, and for the full criminal mischief, with that mischief represented by the full offence description.

The normative value of the VAR is thus identified *both* in its role as a condition of liability, as well as through its nexus forming between the wider elements of an offence. Both aspects are essential when we analyse the application of an offence in practice: we must be satisfied with the way courts are applying requirements for conduct and voluntariness, as well as applying rules relating to the nexus between D's voluntary conduct and other offence elements (eg, rules of causation, coincidence, and so on). Beyond this, both aspects of the VAR are also essential (or should be essential) to the way we evaluate offences and/or within reform discussions. When analysing and evaluating an offence it is important to assess the specific construction of each element, the level and target of required mens rea, the factual matrix of circumstances, the threshold for any results, and so on. However, for these elements to be tied

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<sup>72</sup> The potential to trace D's agency from her voluntary bodily conduct is aptly described by Davidson as an "accordion effect". Davidson (n3 above) 54.

back to D, to be blamed on D, this relies on the VAR, on what D voluntarily did or failed to do in relation to those wider elements. Therefore, the legitimacy of the law's claim to blame D for the object of an offence (ie, for the full offence description), is necessarily dependent upon both the identification of voluntary conduct and upon the adequacy of any nexus between that conduct and other offence elements.

The normative role of the VAR is therefore more complex and nuanced than simple condition or object, and requires further unpacking. In what follows, the role of the VAR within the attribution of criminal agency and responsibility is explored across three sections. The first two sections identify and discuss the role of the VAR in restricting certain forms of criminalisation: first the condition that all legitimate offences must include a requirement of act or omission (Part 3A), and second that such conduct must be voluntary (Part 3B). These restrictions do not amount to a theory of acceptable criminalisation, but should still be recognised as important limitations within the law. Finally, we explore the necessary implication of the VAR that all criminal offences must include an identifiable and justifiable nexus between the VAR and other offence elements (Part 3C). The nature and extent of this nexus is a matter of normative debate, but it is a debate that should be central to the evaluation of criminal offences, and a debate that demonstrates the full utility and essential role of the VAR.

### **Part 3a. All criminal offences must include a requirement of bodily conduct**

The first restriction imposed by the VAR is perhaps the most obvious, that all legitimate criminal offences must include criminal conduct (ie, a bodily act or omission). Such conduct is the only way a person can influence the external/public world, and therefore represents the

essential root though which we may blame D for a complex criminal event.<sup>73</sup> Where an offence requires certain results to be demonstrated, it must be possible to trace those results back to D's criminally basic conduct as a cause; and where an offence requires certain circumstances or mens rea, it must be possible to show that such circumstances or mens rea are accompanied by D's conduct. Such conduct will standardly have the additional role of locating the potential offence in time and in space,<sup>74</sup> though this need not always be the case.<sup>75</sup>

A critical response to this requirement should correctly highlight its limited role in restricting criminalisation. This criticism should not be overstated: the fact that we are always either moving or not moving does not mean that the requirement of bodily conduct within the VAR will always be satisfied. This is because, of course, when we look at criminal offences they do not proscribe all conduct, but rather focus on movements or omissions that cause particular results, or specific conduct accompanied by certain mens rea or in certain circumstances. For example, voluntary omissions only become criminally relevant when contravening a legal duty to act. In this way, conduct relevant to the criminal law is not all encompassing, but often very specific.<sup>76</sup> However, critics would be correct to highlight that a requirement of bodily conduct does not prevent the creation of offences with extremely wide or trivial act elements in the future, for example "doing *anything* whilst intending to kill".<sup>77</sup> Such an offence would not contradict this part of the VAR. However, as we discuss further in Part 3C, the VAR may still provide the best route to understand and highlight what is wrong with hypothetical offences of this kind.

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<sup>73</sup> This does not, however, require voluntary conduct to be explicitly discussed in every case before the court, any more than other essential requirements (eg, the D is 10 year old or over). It simply means that the element should always be discussed where it is potentially lacking. Cf Duff (n9 above) 251.

<sup>74</sup> Moore (n3 above) 3 & 289.

<sup>75</sup> For example, for complicity liability, and for liability constructed upon doctrines of prior fault, D's conduct is likely to be identified some time before the offence is constituted.

<sup>76</sup> It is not a criticism, therefore, to say that D is not omitting to do X (criminally relevant conduct) because she is doing Y (not criminally relevant conduct). Cf. Fletcher (n8 above) 1452.

<sup>77</sup> Discussed in A.P. Simester, 'Structure and Function in Criminal Law' [Review] (1998) 57(3) *CLJ* 616, 617.

Although the VAR can be satisfied by any voluntary act or omission, it would be wrong to represent even this aspect of the VAR as trivial. The identification of D's conduct is still essential for us to investigate D's agency in relation to the full offence description; to understand what D *did* wrong. And even if it is possible to design an offence that satisfies the element in only a minimal way, it remains true that certain forms of illegitimate criminalisation are categorically excluded. Thus, for example, the VAR rules out the potential for pure thought offences (eg, 'forming an intention to kill'), or pure status offences (eg, 'having naturally blond hair'),<sup>78</sup> and any other offence construction where D's conduct is irrelevant.

### **Part 3b. All criminal offences must include a requirement of voluntariness**

The second restriction imposed by the VAR is that, for all legitimate criminal offences, D's bodily movements or omissions must be performed voluntarily. Although the requirement of criminally relevant bodily conduct can physically tie D to other elements of her offence within the external world, the voluntariness of such conduct remains an essential condition if we are to legitimately raise questions about D's responsibility. This is not to say that whenever D completes voluntary conduct leading to a particular harm then D will or should be responsible for that harm. Rather, it is contended that where D's conduct is *not* voluntary then she is not responsible for it, and the basis for allocating blame for the more complex offence description is undermined.<sup>79</sup> D's criminal agency and impact on the world must be voluntarily performed before any legitimate questions of blame can arise.

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<sup>78</sup> Note that the status offences discussed in Part 2B were not "pure" status offences because they relied on D's conduct in gaining or retaining the status.

<sup>79</sup> This will be the case for all offences, even those constructed on D's prior fault, where such prior fault must be established through voluntary conduct.



To make normative sense of the voluntariness requirement, however, we must first take some time to understand its construction. Within Part 2A, we were able to free this question from a raft of philosophical constraints: where the VAR is located within a metaphysical realist conception of action, for example, the definition of voluntariness is commonly restricted by the role it is required to play in identifying bodily conduct as intentionally basic. Freed from such restrictions, we have defined voluntariness within the VAR more expansively to include all movements where D maintains deliberative control, where D's conduct is 'voluntary under some description'. This approach is useful because it allows us to describe voluntary conduct as it is experienced, not necessarily as a set of individually and consciously willed bodily movements, but as a complex intentional event. The VAR must then look within this complex event to identify D's bodily conduct, and to assess whether this conduct was performed as a component of the voluntary or intentional whole.<sup>80</sup> When moving her body, or when omitting,<sup>81</sup> D must have been able to choose to act differently had she so intended.<sup>82</sup>

Given the role of voluntariness in opening the door to potential criminal responsibility, in telling us when D is the agent of her bodily movements and omissions, several commentators have contended that the law should require more than the relatively expansive definition provided above. For example, the VAR could include a stipulation that D must have had a *freedom* in her choice, for an absence of physical or mental duress.<sup>83</sup> The headlines within these approaches can be convincing, calling for the narrowing of liability to only those who engage freely in criminal conduct. However, it is contended that conditions of this kind, to the extent that they should be incorporated within the criminal law, are more appropriately defined and

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<sup>80</sup> Where D's conduct does not form part of an intentional complex event (eg, D simply moves her body absentmindedly), the question is whether such conduct was within her rational control.

<sup>81</sup> D's omission to resist another person moving her body is included here.

<sup>82</sup> This does not mean that D must have been able to act differently, just that she must have been able to choose to do so. See, Simester (n8 above) 419-423.

<sup>83</sup> This is true for Husak, for example, who interprets a "control" requirement to question the voluntariness and responsibility of those addicted to certain drugs. Husak (n55 above) 77-82.

applied as defences (as they are within the current law): accepting that D has voluntarily acted, has possibly caused harm, but may be excused for that conduct as a result of surrounding circumstances. To claim that D does not act voluntarily in circumstances of duress, for example, seems counterintuitive, it is simply that we understand (and sympathise) with her choices.

A further example of overstatement can be found in several critiques of one of the leading cases said to exemplify a lack of voluntary conduct: *Larsonneur*.<sup>84</sup> In this case, D was convicted of being found in the United Kingdom without permission, and yet it was an accepted fact that D was only in the United Kingdom because she had been brought into the country against her will by police. This case is correctly criticised in terms of liability being found, but it is contended that such criticism should not focus on a lack of voluntary conduct. When entering the United Kingdom, D's bodily conduct was voluntarily performed, she was not picked up and carried.<sup>85</sup> D's conduct was encouraged, perhaps even coerced by the police, but (in line with the discussion of 'freedom' above) the relevance of this should be for potential defences or entrapment. This is not to endorse the decision in *Larsonneur*, but to clarify that the case is objectionable because of the role of the police in forcing D to act in an illegal way, not because her bodily conduct was involuntary.

In the process of resisting overstatements of this kind, the normative role of the voluntariness requirement within the VAR can appear diminished. But in reality, the opposite is true. As discussed in Part 1, the problem with current uncertainties and overstatements about the VAR is that they lead to uncertain application and weaken the fundamental principles at play. This is certainly true of the voluntariness requirement as it is applied within the

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<sup>84</sup> 149 L.T.R. 542 (1933). Criticised for its failure to adhere to the VAR in Williams (n25 above) 11, a position standardly adopted within criminal law textbooks.

<sup>85</sup> As was the case in *Martin v State* (31 Ala.App.334 (1994)), where D's conviction was quashed. Cf *Winzar v Chief Constable of Kent*, The Times, 28 March 1983.

substantive current law. The voluntariness requirement within the VAR provides an essential condition for responsibility; provides the route through which we can attribute D's bodily movements and omissions to her as a moral agent, and through which other offence elements may be linked back to D. However, as the substantive criminal law has struggled to clarify and define this requirement, it has been largely avoided and recast within the 'defence' of automatism.<sup>86</sup> The debate has thereby been shifted from defining voluntariness as an essential ingredient of legitimate criminal blame, to defining involuntariness as a route to exculpation. This shift within the substantive law continues to weaken the VAR.

The current 'defence' of automatism is deeply problematic in two related respects: its uncertain equivalence to involuntariness, and its threshold for application. On the first of these, despite automatism standardly being referred to as a defence, it is clear that this cannot be the case.<sup>87</sup> Where voluntariness is essential to criminal responsibility, then its absence results in a lack of inculcation (ie, the VAR) and it is therefore illogical to speak of an exculpating defence. What we might label as the defence of automatism is more accurately presented as the negation of an element within the VAR; but one with uncertain scope. Automatism could be interpreted simply as synonymous with involuntariness,<sup>88</sup> which would represent the clearest way forward, but also exposes the use of the term as unnecessary. Or, as is perhaps more common, we could interpret automatism as a subset of involuntariness applicable to those who lack consciousness for example, but not to those physically manipulated by others.<sup>89</sup> This latter interpretation provides a distinction from the wider term involuntariness, but it is a distinction that can only confuse things further: it begs questions about why automatic involuntariness requires separate

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<sup>86</sup> J.J. Child & A. Reed, 'Automatism is never a defence' (2014) 65 *NILQ* 167.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Bratty v AG for NI* [1963] AC 386.

<sup>89</sup> D. Ormerod & K. Laird, *Smith, Hogan and Ormerod's Criminal Law* (15<sup>th</sup> Ed, 2018) 307: "Someone is an automaton or in a state of automatism where his conscious mind is dissociated from that part of the mind which controls action."

identification, and whether prior-fault rules for example can and should apply consistently.<sup>90</sup> These debates confuse the law with no tangible benefits.

Stemming from the uncertain status of automatism, the second ‘threshold problem’ is more pertinent to our current concerns. The issue here is that having relocated discussion of involuntariness to the ‘defence’ of automatism, the common law in jurisdictions such as England and Wales has interpreted and evolved the rules as if they apply to exculpate a defendant from wrongdoing (ie, as a defence). Alongside many common law defences, the automatism rules have been narrowed considerably in recent years. This is perhaps best illustrated in Lord Justice Hughes’ leading judgment in *Coley*,<sup>91</sup> where a potential defence of automatism was rejected on the facts. In *Coley*, D physically assaulted his neighbour whilst experiencing what doctors described as a “brief psychotic episode”, meaning that at the point of attack D had no conscious or rational control over his movement. However, reflecting upon the complex movements performed by D during this episode, the court rejected the potential application of automatism, and rejected an involuntariness description.<sup>92</sup>

[D’s] mind may well, if the doctors were right, have been affected by delusions or hallucinations and in that sense his detachment from reality might be described by some as an absence of conscious action. Such condition, however, clearly falls short of involuntary, as distinct from irrational, action. . . . [T]he defendant would, despite their hypothesis or psychotic episode, have been capable of complex organised behaviour. It is plain that a person acting under a delusion may act in such a way, and clearly this defendant

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<sup>90</sup> Prior-fault rules have developed with reference to automatism, but it would be hard to justify why prior-fault leading to non-automatic involuntariness should be treated differently.

<sup>91</sup> [2013] EWCA Crim 223. Discussed in R. Mackay, ‘Case comment: *R v Coley*; *R v McGhee*; *R v Harris*’ (2013) *CrimLR* 923.

<sup>92</sup> Note that the comments here do not engage with the separate issue of prior fault, in this case relating to D’s voluntary intoxication.

did. . . . The doctor said ‘He is conscious in a way but it is conscious in the belief that he is a character [in a computer game]. He does not have an awareness of what he is doing.’ That is a description of irrational behaviour, with a deluded or disordered mind, but it is not a description of wholly involuntary action.<sup>93</sup>

It is contended that the decision and analysis in *Coley* only makes sense if we consider automatism as a defence, asking what conditions D must satisfy to avoid liability for the crime he has committed (ie, was his conduct justified or excusable?). Once we recognise automatism as a synonym of involuntariness (or as a sub-set of involuntariness) then we also recognise that what is at play is not a defence, but rather the voluntariness requirement within the VAR. This recasts the question to one of inculcation: was D responsible for the movements of his body; was he in sufficient deliberative control to be held responsible for the harms that occurred? Recasting the question in this manner, it would be extraordinary for a court to find irrational conduct performed without awareness as sufficient grounding for liability.<sup>94</sup> In this manner, clarification and restatement of the voluntariness requirement within the VAR can serve a crucial normative end, and perhaps (it is suggested) lead us away from discussion of automatism entirely.

### **Part 3c. All criminal offences must include a nexus between D’s VAR and other elements**

Within this final section of Part 3 we explore the role that can be played by the VAR in understanding and determining the relationship between offence elements. The role of the VAR

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<sup>93</sup> Para 24.

<sup>94</sup> Compare the US case of *People v Newton* (87 Cal.Rptr. 394 (1970)) where similar complex movement to that in *Coley* was nevertheless held to be involuntary, with the court focusing on the minimum requirements for responsibility. Discussed in Yaffe (n3 above).

as a nexus between D and a full offence description has already been highlighted, locating D's relevant impact on the world, providing a causal root to more complex action, and so on. However, it is important to provide some more detail about the precise (potential) benefits of the VAR in forcing us to consider this relationship/nexus with other offence elements more thoroughly. We may begin with what D has *done* (the VAR), but must now expand from this, asking whether and to what extent this *doing* should be criminally blamed, in light of its results, the surrounding circumstances and mens rea.<sup>95</sup> It is contended that exploring the nexus between the VAR and other offence elements provides the best route through which to analyse and evaluate the criminal law, as well as the best route through which to begin to construct a theory of legitimate criminalisation.

A note of caution is required; this section does not attempt to build a theory of legitimate criminalisation. However, it does aim to demonstrate the vital role and utility of the VAR within such an endeavour. In order to understand the full benefits of a clearly defined VAR in this regard, it is useful to distinguish two areas of discussion. First, an outline of the descriptive benefits of the VAR in explaining the nexus between offence elements, and understanding complex offence constructions. Second, an exploration of the benefits of the VAR in debating and understanding the normative dimensions of the nexus, looking squarely to debates about the boundaries of legitimate criminalisation, and about what such a nexus *should* require.

### ***Understanding the nexus between offence elements***

Before we discuss the normative aspects of offence construction, it is important to first outline the role that can be played by a clearly defined VAR in describing and analysing the law. At the root of every criminal offence, the VAR (or conduct element) provides the essential starting

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<sup>95</sup> D's responsibility can also be assessed in the opposite direction, beginning with the complex act description, as is more standard within courtroom discussion. However, the root of D's responsibility remains the same.

point for description and analysis of a full offence. Where an offence includes a result element, for example, it must be demonstrated that D's conduct was causally related to that result; where there are circumstances and mens rea, these must standardly coincide and correspond with D's conduct, and so on. Separating offences into elements in this fashion provides a host of analytical benefits, allowing offences to be dissected and discussed in stages, and has been the subject of an extensive scholarship.<sup>96</sup> It is a model of element analysis that has been explicitly endorsed and adopted within the US Model Penal Code.<sup>97</sup> It is also, crucially, a model of element analysis that relies upon a clearly defined conduct element, from which other offence elements can be identified.<sup>98</sup> This is an important role for the VAR and should not be underplayed. Indeed, for commentators such as Yaffe, the role of the VAR in locating offence elements and making sense of the correspondence between elements is the primary purpose for its identification.<sup>99</sup>

Within uncodified jurisdictions such as England and Wales, no single model of analysis is officially adopted, and courts and commentators have remained sceptical about the merits of element analysis (ie, the analytical separation of conduct, circumstances and results). Chiefly, this scepticism has focused on the seeming inability of the advocates of element analysis to demonstrate how each element can be objectively identified and separated within an offence.<sup>100</sup> This scepticism culminated in the explicit rejection of element analysis by the Law Commission as a model for structuring offences in the 1970/80s.<sup>101</sup> However, first within the

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<sup>96</sup> Led by Paul Robinson. See, eg, P. Robinson & J. Grall, 'Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond' (1983) 35 *StanLR* 681.

<sup>97</sup> US MPC §2.02.

<sup>98</sup> Robinson (n3 above) Ch2. Robinson advocates a more complex scheme of offence elements that I would not endorse, but D's conduct remains the central nexus point.

<sup>99</sup> Yaffe (n3 above). See also, R. Gainer, 'The Culpability Provisions of the Model Penal Code' (1987) 19 *RutLJ* 575.

<sup>100</sup> See, for example, R. Buxton, 'The Problem with Reckless Attempts' (1983) *CrimLR* 365; 'Circumstances, Consequences and Attempted Rape' (1984) *CrimLR* 25; R.A. Duff, 'The Circumstances of an Attempt' (1990) 50(1) *CLJ* 100.

<sup>101</sup> Law Commission, *Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement* (Law Com No 102, 1980) [2.12].

1989 Draft Criminal Code, and then later within a series of more recent reports on the inchoate offences of attempt, conspiracy and assisting and encouraging, the Commission has reversed its earlier position and adopted element analysis as a model for its discussion and reform recommendations.<sup>102</sup> Stemming from these recommendations, the Serious Crime Act 2007 has now incorporated much of the Commission's work on assisting and encouraging into law,<sup>103</sup> and the courts have taken a similar approach for attempts liability.<sup>104</sup> The ability to separate and discuss elements within inchoate offences, and in particular the elements of an offence within D's ulterior mens rea, has been vital in order to articulate desired policy changes.<sup>105</sup> However, crucially for current purposes, the Commission and the courts have not refuted the previous criticisms of imprecision, which have continued to undermine the effective use of element analysis.<sup>106</sup>

Whether we are using element analysis to understand the elements of a standard offence, or whether we are analysing a more complex offence involving ulterior mens rea, it is clear that the precision and objectiveness of our separation of elements is all important. For critics and advocates alike, it is recognised that such precision and objectivity can only be achieved through a clearly defined VAR. The stripped-back approach outlined in this article promises that definition.

### ***How should offence elements relate to the VAR?***

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<sup>102</sup> See, Law Commission, *A Criminal Code for England and Wales: Volume 2 Commentary on Draft Criminal Code Bill* (Law Com No 177, 1989) [13.44]-[13.45]; *Inchoate Liability for Assisting and Encouraging Crime* (Law Com No 300, 2006); *Conspiracy and Attempts* (Law Com No 318, 2009).

<sup>103</sup> Serious Crime Act 2007, Part 2. See, J.J. Child, 'Exploring the Mens Rea Requirements of the Serious Crime Act 2007 Assisting and Encouraging Offences' (2012) 76 *JCrimL* 220.

<sup>104</sup> See, *Khan* [1990] 1 WLR 813. This case requires D to have a particular mens rea towards the circumstance element of the offence she is attempting, thus relying on the analytical separation of elements.

<sup>105</sup> Discussed in J.J. Child, 'The Structure, Coherence and Limits of Inchoate Liability: The New Ulterior Element' *LS* 34(4) (2014) 537.

<sup>106</sup> The Serious Crime Act 2007 Part 2 offences, for example, have been criticised by a number of commentators. See, for example, D. Ormerod and R. Fortson, 'Serious Crime Act 2007: The Part 2 Offences' [2009] *CrimLR* 389.



The existence of a VAR as the root of D's agency implies the requirement of a nexus between D's conduct and other offence elements. We have discussed how this can be understood in descriptive terms. However, what does it mean in a normative sense? For example, beyond a causal relationship with results, what does it mean to have a nexus of agency between D's conduct and circumstances or mens rea? Surely a requirement of simple temporal coincidence is insufficient as the basis for deserved associative blame?

These questions are difficult to answer with any certainty, and it is a difficulty that has given rise to criticism of the VAR defined in terms of voluntary bodily conduct alone. Take the following example from Husak:

Suppose legislators in a given jurisdiction ... propose a new statute that defined treason as 'compassing the death of the king.' One legislator, especially adept at criminal theory, objects to this new statute on the ground that it violates the act requirement. In order to mollify his concerns, the legislators agree to amend the statute to include an additional clause that allows liability to be imposed only on persons who had performed the act of eating at the same time prior to the moment at which they compassed the death of the king.<sup>107</sup>

The point being made in this example is that, although the VAR can be used to object to thought offences and pure status offences,<sup>108</sup> such offences can simply be redrafted to satisfy the VAR by including non-relevant voluntary conduct: the offence remains equally objectionable, and yet the VAR is satisfied. This being the case, the argument continues, the VAR (defined in

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<sup>107</sup> Husak (n55 above) 67-68. A similar point is noted by Simester (n77 above).

<sup>108</sup> See discussion in Part 3A.

relation of voluntary movement) cannot perform its task of restricting illegitimate criminalisation.

In order to meet this challenge head on, it is necessary to provide further concrete requirements detailing the nexus between the VAR and other offence elements. There are several examples in the literature that can be used for this purpose. We might say, for example, that the VAR must provide a contribution towards the central criminal mischief of the offence,<sup>109</sup> or that it must in some way manifest D's criminal intention.<sup>110</sup> Indeed, theories of agency and control, often presented as alternatives to the VAR, may be better applied to *this* task. In attempting to provide an alternative to the VAR, agency and control theories are legitimately criticised for lacking clear causal roots; for neglecting the crucial role of actions in manifesting D's agency and control.<sup>111</sup> Accepting a role for the VAR provides essential grounding for such theories, and allows us to recast them as potential expositions of the nexus *between* the VAR other offence elements. The analysis of fine-grained variations between these theories, and decisions about precisely which should be preferred, lays outside the boundaries of this article; and perhaps outside the boundaries of necessity for the substantive criminal law.<sup>112</sup> However, some coarse-grained analysis is useful.

At its minimum, a coarse-grained approach to the nexus between the VAR and other offence elements should require courts and commentators to identify how and why criminal harms are attributable to D as products or corollaries of her voluntary action. This approach will not straightforwardly *prevent* the creation of objectionable offences that include a requirement of voluntary conduct; but a focus on the VAR and nexus between elements can be instrumental in exposing why offences of this kind *should* be rejected. For example,

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<sup>109</sup> This approach is adopted in Sullivan (n17 above).

<sup>110</sup> This approach is adopted in Yaffe (n3 above) 183-189.

<sup>111</sup> See critique in Duff (n8 above) Ch 3.

<sup>112</sup> It is highly unlikely that our legal system will endorse a particular fine-grained theory of agency or control.

criminalising the bare intention of ‘compassing the death of the king’ is not simply illegitimate because it does not include a conduct requirement, and it is clear that an unrelated voluntary conduct requirement does not legitimise such an offence. However, being forced to identify the voluntary conduct within an offence leads us to question what link there is between such conduct and (in this case) mens rea, and it is the absence of any nexus here that exposes our concerns. When we ask what D has *done* in relation to this intention that makes it a legitimate target of the criminal law, any answer relating to her breakfast is clearly inadequate: inadequate not because voluntary conduct does not matter, but precisely because it does.

This form of evaluation, focusing on the role of the VAR in linking the elements of an offence, is not simply useful in relation to extreme hypotheticals of the kind just discussed, but can help us to understand legitimate objections to a range of controversial offences within the current law. This covers offences like the hypothetical where D’s conduct does not relate to other elements of her offence at all, but also offences where the relationship is diminished by time or context. This includes, for example, vicarious liability offences, where we must trace back to D’s forming of the vicarious relationship or failure to divest of it; status offences, where we must locate D’s acts in gaining the status or failing to divest; or offences committed due to intoxication or other prior fault, leading D to cause harms when lacking voluntary control, where again we must trace back to D’s original acts.<sup>113</sup> In each of these areas, it is contended, a focus on D’s voluntary conduct, and trying to understand the necessary nexus between that conduct and other offence elements, is the most informative route to effective evaluation. To take just one example, let us consider again the strict liability offence applied to parents whose children fail to attend school regularly.<sup>114</sup> D will be liable for this offence whenever her child fails to attend school regularly, regardless of her efforts to ensure the child attends, and

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<sup>113</sup> Cf. Hart, who would present prior fault cases as an exception to the VAR. Hart (n8 above)106-112. See also, Dimock (n63 above).

<sup>114</sup> An offence under the Education Act 1996, s441.

regardless of her knowledge of non-attendance.<sup>115</sup> Rather than dismiss this offence as lacking a VAR, it is more informative to trace D's necessary conduct, and to ask what D has done or failed to do in the context of this offence. The answer is either that D has *done* something in simply having a child with all potential liability flowing from this, or that D has *failed* to prevent something she was unaware of or unable to control. We may then ask whether this conduct is sufficiently wrongful, or sufficiently linked to the mischief of her child, to justify criminalisation rooting from it.

The VAR forces us to ask questions of this kind; and they are worth asking. As Sullivan has highlighted, when courts have asked questions of this type, real improvements have been possible.<sup>116</sup> For example, section 11(2) of the Terrorism Act 2000 creates an offence of belonging to a proscribed organisation, with a specific 'defence' available if D can show that the organisation was not proscribed when she was active, and that she has not been active since. Constructing the offence in this manner seemed to create a pure-status offence (ie, being a member) with any analysis of D's actions appearing as a defence. Identifying this issue, the House of Lords held that D could only be legitimately blamed for the mischief of the offence if she *joined* the organisation after it was proscribed or if she was *active* during this period; demonstrating a link to conduct was essential for blame, and so the absence of a 'defence' had to be reinterpreted as a core element of the offence.<sup>117</sup> This is only one example of course, and even this should not be presented as the finishing point for appropriate evaluation: we can and should still question whether 'active' membership of a group is a legitimate target for criminalisation. However, it does demonstrate that the VAR can have a useful role within the

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<sup>115</sup> This strict interpretation of the offence was upheld by the Divisional Court in *Alison Barnfather v London Borough of Islington, Secretary of State for Education and Skills* [2003] 1 WLR 2318, and again in *New Forest Local Education Authority v E* [2007] EWCH 2584. In the latter case, D was liable despite risks of violence to her and her daughter from her truanting son.

<sup>116</sup> See Sullivan (n17 above) 251.

<sup>117</sup> *Attorney General's Reference* (No4 of 2002) [2005] 1 AC 264.

evaluation of an offence, helping us to understand that for which D is (or critically, is not) blameworthy.

## CONCLUSION

Within the plethora of debates about minimum requirements for criminalisation, or acceptable limits, the VAR has maintained an enviable status: it is wholly, or at least partially, accepted as a rule of substantive criminal law across jurisdictions, several of which have codified it into legislation. However, in holding such a unique status, the VAR is also made vulnerable. Vulnerable to its ‘friends’, who would like to adapt and reinterpret the requirement to achieve more, seeing it as an acceptable vehicle for broader theories of criminalisation, and/or comprehensive theories of action in general; and vulnerable of course to its critics, who challenge its unprecedented status, and expose the overstatements of its advocates.

This article has attempted to strip-back the VAR, and simplify the debate surrounding it. Breaking the VAR from its reliance upon metaphysical theories of action, the article has provided a definition of voluntary conduct within the criminal law and explained the vital role that can be played by that requirement. The VAR set out in this article is not claiming to do more than competing theories, either descriptively or normatively; indeed in many ways it is claiming to do considerably less. However, it is claiming to provide a descriptive stability that is not shared by competing theories, and it is maintained that the core normative benefits of the VAR can still (can only) be achieved through this mechanism. The current status of the VAR within the criminal law of England and Wales can be described as precarious at best, with courts equivocal as to its usefulness,<sup>118</sup> offences created without clear reference to conduct, and

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<sup>118</sup> See, for example, *Robinson-Pierre* [2013] EWCA Crim 2396, where the Court of Appeal interpret liability to require an act [42], but also state that Parliament may create offences without such action [38].

perhaps most concerning, the ‘defence’ of automatism becoming progressively weaker in its application. It is contended that such trends can only be reversed through the acceptance of a *viable* model for the VAR, and it is this model that has been defended.